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in the

Supreme Court

of the

United States

OCTOBER TERM, 1971

NO. 71-1023

ALBION CRANSON and
JOSEPH J. KLOSTERMAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioners, Albion Cranson and Joseph J. Klosterman, pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on February 2, 1972, denying their Petition for Rehearing, thereby affirming that Court's judgment of December 29, 1971, wherein that Court affirmed Petitioners' conviction in the United States District Court for the Eastern District of Virginia, rendered on December 4, 1970.

JUDGMENT AND OPINION OF THE COURT BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit rendered on December 29, 1971 is set out in Appendix A, which is attached to this Petition along with the Order of the Fourth Circuit Court of Appeals denying the Petitioners' Petition for Rehearing.

JURISDICTION OF THIS COURT

1. The date of the judgment sought to be reviewed is February 2, 1972. This Petition is, therefore, filed within thirty days.

2. The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254 and Rule 22 of the Rules of this Court.

QUESTIONS PRESENTED FOR REVIEW

I

WAS THE PETITIONER CRANSON'S RIGHT TO A FAIR TRIAL VIOLATED AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN DURING HIS TRIAL THE TRIAL

COURT ALLOWED THE PROSECUTOR TO READ FROM A PRIOR STATEMENT MADE BY A WITNESS TO THE FBI UNDER THE GUISE OF REFRESHING THE WITNESS' RECOLLECTION?

II

WERE THE PETITIONER KLOSTERMAN'S RIGHTS TO A FAIR TRIAL AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION VIOLATED WHEN THE TRIAL COURT REFUSED THE PETITIONER'S REQUEST TO HOLD A HEARING OUTSIDE THE PRESENCE OF THE JURY TO DETERMINE WHETHER PRETRIAL CONFRONTATIONS BETWEEN A VITAL IDENTIFICATION WITNESS AND THE ACCUSED VIOLATED DUE PROCESS?

III

WERE THE PETITIONER KLOSTERMAN'S RIGHTS TO A FAIR TRIAL AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION VIOLATED WHEN THE TRIAL COURT ALLOWED THE GOVERNMENT TO MAKE USE OF A STATEMENT MADE BY THE PETITIONER KLOSTERMAN TO AN FBI AGENT DURING THE CROSS EXAMINATION OF THE PETITIONER KLOSTERMAN WHEN THERE WAS NEVER ANY SHOWING BY THE GOVERNMENT THAT THE STATEMENT WAS VOLUNTARY?

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED:

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

STATEMENT OF THE CASE

In July of 1970, there was filed in the lower court an indictment in eleven counts charging the petitioners, Albion Cranson, Joseph J. Klosterman and David Chase with a conspiracy in the first count and substantive offenses in the remaining ten counts. (As to Klosterman, he was charged in only two substantive counts, while Chase and Cranson were included in all substantive counts.)

At the arraignment of the petitioners in September, 1970, each pled not guilty to the indictment then on file.

On December 4, 1970, the matter was submitted to the jury and the jury returned its verdict finding the petitioner Klosterman guilty as to the three counts of the indictment that pertained to him; and as to the petitioner Cranson the jury found him guilty of all seven counts of the indictment as it pertained to him.

On January 29, 1971, the court sentenced the petitioners. In said sentence of imprisonment the court did exercise its option under the split sentence provision and after a sentence of imprisonment did have a grant of probation to each petitioner.

An appeal was taken to the United States Court of Appeals for the Fourth Circuit raising the three questions which are sought to be reviewed here.

On December 29, 1971, the United States Court of Appeals for the Fourth Circuit issued its Opinion affirming Petitioners' conviction. On February 2, 1972, the United States Court of Appeals for the Fourth Circuit issued its order denying Petitioners' Petition for Rehearing.

In the indictment filed in the trial court the petitioner Cranson was charged in seven counts jointly and the petitioner Klosterman was charged in three counts, together with Cranson.

The first count of the indictment charged a conspiracy. The next two counts charged Cranson, Chase and Klosterman with violation of the Dyer Act, both counts pertaining to transportation of the same automobile. The next four counts of the indictment pertain to only Cranson and Chase and charged a violation of the Dyer Act, although these last four counts involving petitioner Cranson involved two separate motor vehicles.

The indictment charged a conspiracy lasting over a period of several months; and charged substantive offenses that occurred on separate occasions during the period of time covered by the conspiracy.

The government's case involved an auto theft "ring" scheme whereby motor vehicles of the general classification referred to as high-priced cars, but not in the category of Lincolns and Cadillacs were stolen. The cars were mainly Buick Rivieras, Pontiac Bonnevilles, etc. The total

number of automobiles the government maintained were involved was approximately 25 automobiles. The government concerned itself with only three separate automobiles in the substantive offenses of the indictment and, naturally, in the conspiracy part of the indictment it concerned all automobiles.

One of the government's key witnesses against Cranson was a George Betts. He testified that in October of 1968 he had a conversation with petitioner Cranson. Betts stated that Cranson had offered him a job working for him, the prosecutor asked the witness, doing what, and the witness said automobiles. When asked what kind of automobiles the witness said he *assumed* them to be stolen (TR. 448). Defense counsel objected to the witness' assumption and the court instructed the witness to simply state what he said and what Cranson said. The witness stated that to the best of his recollection he did not ever remember hearing the phrase "stolen" (TR. 449). The prosecution then stated: "Did you have a subsequent to this occasion did you, were you interviewed by two agents of the F.B.I.?"

Defense counsel objected on the ground that the government was attempting to impeach their own witness. The court overruled the objection, stating that the government was simply trying to refresh the witness' recollection. The prosecutor then, referring to an F.B.I. memorandum attempted to show it to the witness, but the court stated as follows: "It's not his statement. Don't show it to him. Just ask him if he told the F.B.I. a certain thing.

BY MR. GETTINGS:

Q. Did you use the phrase, and talking to the F.B.I. —" (TR. 450)

Again the court interjected itself:

"THE COURT: Ask him. *Ask him if he told the F.B.I. whatever you want to know, certain* man, name him.

BY MR. GETTINGS:

A. Of course we're speaking only of Mr. Cranson, now. Did you tell him, the F.B.I. agents that Mr. Cranson had offered you a job hustling stolen cars?

MR. KAY: I'm going to object, Your Honor.

THE COURT: Objection overruled. He is refreshing his recollection. He can say he didn't or he doesn't recall." (TR. 450)

Again the witness refused to testify that he remembered the petitioner Cranson saying the cars were stolen. During cross examination he again reasserted the fact that the petitioner Cranson at no time told him where these cars were being acquired (TR. 456).

During this cross examination a good example of the way the court interjected itself in what the petitioners would most respectfully submit was an unfair way asked:

"Q. All he told you is he wanted you to sell some automobiles.

A. Right.

Q. Did he mention—

THE COURT: Wait a minute. Wait a minute. He said, he said more than that. So he told him how he wanted to sell them according to this Mr. Betts' statement. He didn't tell him where they were to come from, he told them he was to set up a residency and he would give him, furnish the late model car and you would sell it in the residence and then take another residence; isn't that what you said he told you?" (TR. 456)

The witness tried to explain his answer to the court.

"THE WITNESS: Yes, sir, but this gentleman's question to me was—" (TR. 456)

Finally, the decision was resolved in the following fashion:

"THE COURT: I understand that. The reason I'm pointing out to him that you did say more than that—

MR. STAHL: Well, Your Honor, my question was I merely asked him if he was to sell the cars. I did not ask him how he was to sell the cars.

THE COURT: Go ahead." (TR. 457)

As to Petitioner Klosterman, the trial court refused to allow defense counsel to have hearings outside the presence of the jury on matters of identification.

The Government called as a witness, Mr. Kenneth Goode, who testified that he was an assistant sales manager of the Temple Motor Company, and that a gentleman drove in with a Buick Electra and sold him the car.

During direct examination the following occurred:

> Q. Do you see him in the courtroom today?
>
> A. To be fair with myself and the jury, I'm almost sure, but I could not possibly say one hundred per cent after two and a half years and only seeing him for a short while.
>
> THE COURT: All right.
>
> BY MR. DAVIS:
>
> Q. Is there somebody you think you are almost sure?
>
> THE COURT: Objection sustained. He said he wanted to be fair, he can't be sure."

(TR. 165-166)

The prosecution then approached the bench and was obviously able to change the court's mind about the identification. Finally, the court stated, "Next time ask him better. Tell the man go out and pick out the man; don't go into all this and make a mistake." (TR. 166)

Defense counsel violently objected (TR. 166, 167) and again asked for voir dire outside the presence of the jury (TR. 166). The only response by the court was that "We'll get to that" (TR. 167). Then the court decided to handle the identification itself when it stated to the witness in open court:

"THE COURT: You take your time, if you're satisfied, get down off the stand if you care to, you get down and walk around wherever you want to look at anybody you want to before you say anything. If you're satisfied in your own mind, reasonably certain that you see someone you point him out. If you're not, you must get back in your seat and say nothing. You understand what I'm talking about?

THE WITNESS: You said with a reasonable certainty?

THE COURT: Yes, sir; satisfied in your own mind, certainly.

THE WITNESS: That would mean that reasonably certain, that means I would—

THE COURT: You understand what I mean. If there is doubt in your mind about it, who it is, I don't want you pick out the wrong person. If you, and I know it's been a long time, —

THE WITNESS: Yes, sir.

THE COURT: —and there is nothing wrong about that, if you—doesn't make any difference the reason—if you can point out the person that you say sold you that car, point him out; if you can't, just say you can't and that ends that. You walk around, if you want to. Go ahead.

(Whereupon the witness got down and walked around.)

THE WITNESS: I'm reasonably certain that is the man in the center with the striped shirt on.

THE COURT: That is the one, with the striped shirt?

THE WITNESS: Yes, sir.

THE COURT: All right, take a seat.

(Whereupon, the witness resumed the stand.)

THE COURT: Let the record show that he pointed to—what is the gentleman's name?

MR. KAY: Klosterman, Your Honor.

THE COURT: Mr. Klosterman. All right."

(TR. 167-169)

Evidently, the government was as amazed at the identification, as was the petitioner Klosterman. At another bench conference, after the identification when defense counsel again requested a voir dire examination and was again refused, the following colloquy occurred between Mr. Gettings, the prosecutor, Mr. Kay, defense attorney, and the court:

"MR. GETTINGS: *There is a problem, quite frankly, and we might as well get it out.*

THE COURT: What is the problem?

MR. GETTINGS: *I think he picked the wrong guy.*

THE COURT: That is too bad. If you want to concede, that's all right.

MR. GETTINGS: I'm not sure. I want to hear what the next witness says. I don't know whether he did or didn't.

THE COURT: You weren't there. You couldn't possibly know.

MR. KAY: The Court is denying my motion, though?

THE COURT: Yes, sir.

MR. KAY: All right.

THE COURT: I'll let you examine—

MR. KAY: I can't examine him, Your Honor, without bringing out prejudice to the defendant." (TR. 169-170) (Emphasis Added)

Another person who identified Petitioner Klosterman at the trial was a woman named Connie Sisson. As to her testimony Defense counsel also asked for a hearing outside the presence of the jury, which request was denied.

The only other identification witness against Klosterman was a co-conspirator by the name of Boyce James.

The petitioner Klosterman was the only defendant to take the stand at trial. During the cross examination of Klosterman, the prosecution brought out the fact that on June 11, 1970, in Fort Lauderdale the petitioner Klosterman told FBI agents that he had knowledge of a car theft operation. This was in the form of impeachment since in his direct examination he stated that he never had knowledge. The prosecution was using an FBI memorandum form which has been made part of this record on appeal. The questions and answers are as follows:

"MR. DAVIS: It hasn't been used by the government in Direct.

MR. KAY: All right.

THE COURT: You have no confession?

MR. GETTINGS: None, Your Honor.

THE COURT: All right. Just an oral interview?

MR. GETTINGS: That's all.

THE COURT: For impeachment purposes only. Admissible for impeachment.

MR. STAHL: We're objecting to it on the record.

THE COURT: Objection overruled.

(The following proceedings occurred in open court.)

THE COURT: Ask him the specific statement you're referring to and tell him when. This is for impeachment purposes not a truth or falsity of the statement. But merely whether or not he did make this statement to somebody else at a previous time. You identify the time and who he alleged to have made it to and ask him if he made it.

BY MR. GETTINGS:

Q. The date is June 11, 1970 at Ft. Lauderdale, Florida, and the two individuals are Special Agent Shaweanburk of the FBI. Do you recall talking to them?

A. Yes, sir.

Q. And at that time did you tell them on two occasions during that conversation, that you had knowledge of the car theft operation, but that you would not participate in it?

MR. KAY: Excuse me, Your Honor, now I think at least the defendant is entitled to look at the statement he's referring to.

THE COURT: He has no statement.

MR. KAY: Yes he does. We'd like to look at it.

MR. GETTINGS: I have no objection to showing it to the man.

MR. KAY: I want that in the record. May I make that a Defendant's Exhibit for the record, then?

THE COURT: I don't want him to look at it. Let Counsel look at it.

MR. GETTINGS: I'd like the defendant to look at it.

MR. KAY: I'd like this marked Defendants' Two.

THE COURT: The Court will decide what is marked.

MR. KAY: I've seen it.

THE COURT: What is the question?

MR. KAY: You want to make this part of the record.

THE COURT: Do you want to put it all in?

MR. KAY: Yes, sir." (TR. 515-516)

The court then allowed extensive questioning by the prosecution as to what the petitioner Klosterman told the FBI agents (TR. 518-520).

In rebuttal the government then produced one of the FBI agents, Kenneth Schewe (TR. 529). The government then went into the statement and interview by the agent of the petitioner Klosterman (TR. 530-532).

At no time was there a hearing outside the presence of the jury as to the voluntariness of this statement.

The trial court evidently distinguished between a confession and a statement or admission because when defense counsel objected to the use of the statement even for impeachment until his voluntariness was established a matter of law by the trial court. Once the prosecutor stated that he did not have a confession, but only an oral interview, however, the court said that he would allow it into evidence for impeachment purposes:

"THE COURT: You have no confession?

MR. GETTINGS: None, Your Honor.

THE COURT: All right. Just an oral interview?

MR. GETTINGS: That's all.

THE COURT: For impeachment purposes only. Admissible for impeachment.

MR. STAHL: We're objecting to it on the record.

THE COURT: Objection overruled." (TR. 515)

And earlier:

"THE COURT: Is that a confession?

MR. GETTINGS: Your Honor, he made a statement to FBI and I'm impeaching him.

THE COURT: That is on the stand. I understand about the confession. Have you got a confession of his?

MR. GETTINGS: No, it's not a confession. He made—

MR. KAY: It's admission and Miranda says admission, confession, the same thing.

THE COURT: He's got an admission he did it?

MR. GETTINGS: He said that he knew about the ring.

THE COURT: You can impeach him on that. Does he admit he was in this?

MR. GETTINGS: No." (TR. 514)

REASONS ALLOWED FOR ALLOWANCE OF THE WRIT

I

THE PETITIONER CRANSON'S RIGHT TO A FAIR TRIAL WAS VIOLATED AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN DURING HIS TRIAL, THE TRIAL COURT ALLOWED THE PROSECUTOR TO READ FROM A PRIOR STATEMENT MADE BY A WITNESS TO THE FBI UNDER THE GUISE OF REFRESHING THE WITNESS' RECOLLECTION.

Petitioners respectfully submit that the conduct of the trial court in regard to allowing the Government to refresh its witness was completely in error. The case of *Goings v. United States*, 377 F.2d 753 is almost exactly on point. In that case the defendant Goings was charged with burglary on an Indian reservation in South Dakota. Just as in the case at bar, one of the defendant accomplices was called as a government witness. The following questions and answers ensued:

"Q. Now, during August of 1964, where were you?

"A. I can't remember too well.

"Q. To refresh your memory, were you at Pine Ridge?

"A. Yes, sir.

"Q. Now on Thursday evening of August 20, 1964, where were you?

"A. I can't remember.

"Q. Well, to refresh your recollection did you, previous to coming to court here, give a statement to Mr. Moore, Criminal Investigator, and also Mr. McCarty, Special Agent of the FBI? * * *

"Q. Do you remember giving them a statement?

"A. Yes, sir.

"Q. And before coming into court, Delbert, weren't you furnished a copy of that statement to re-read?

"A. Yes, sir.

"Q. And did you re-read it?

"A. I forgot to read it.

"Q. Didn't I ask you whether or not you had looked it over, and didn't you say you had?

"A. I said I forgot to read it.

"Q. Can you read?

"A. Not very good. * * *" (pp. 757-758)

The government then, unlike the case at bar, *outside the presence of the jury* claimed that the witness had surprised the prosecution and declared the court to have the witness declared "hostile". The court thereupon declared that the witness was hostile. The court then ruled that the

prosecution could read from the witness' statement which the prosecution did.

The Eighth Circuit Court of Appeals reversed Goings conviction on this *point alone.*

The court first noted that the overwhelming wave of authority holds that impeachment of one's own witness must be established on the predicate of both "surprise" and "damage". The court noted the case of *Randazzo v. United States* 300 F. 794, where it was held that when a witness merely fails, when called to testify in favor of the party calling him to testify as he was expected to do but says nothing to aid the case of the adversary party, he cannot be cross examined or impeached by the party who calls him.

The court, in *Randazzo*, also pointed out that in that case the witness gave no evidence in any way which was helpful to the defendants, nor did he aid the case of the government. Just as in the case at bar the witness' testimony was wholly colorless and negative in probative effect. The court, in *Goings*, quoted the *Randazzo* case, which stated:

> "In such case, *any* showing of any former statements of the witness, in which he said things hurtful to defendants was inadmissible." (Emphasis added) (p. 759)

The court in *Goings* then considered the question of whether the government was simply refreshing the witness' recollection. This was evidently the feeling of the trial court in the case *sub judice.* The court, in answering this contention stated:

> "Refreshing a witness' recollection by memorandum or prior testimony is perfectly proper trial procedure and control of the same lies largely in the trial court's discretion. However, if a party can offer a previously given statement to substitute for a witness' testimony under the guise of 'refreshing recollection,' the whole adversary system of trial must be revised. *The evil of this practice hardly merits discussion. The evil is no less when an attorney can read the statement in the presence of the jury and thereby substitute his spoken word for the written document.* See *United States v. Block*, 2 Cir., 88 F.2d 618. '* * * the contents of the statements are not to be put in evidence before the jury.' *Young v. United States*, 94 U.S. App. D.C. 62, 214 F.2d 232, at 238." (pp. 759-760).

Perhaps the error would not have been as great if the court had allowed the prosecutor to handle the situation as he wanted to, that is by handing the witness a copy of the statement (TR. 450). But the error became even greater when the court in effect demanded that the prosecutor ask the witness if he told the FBI whatever the prosecutor wanted to prove.

If any further authority is needed, the Fifth Circuit Court of Appeals in the case of *United States vs. Johnson*, 427 F.2d 957, held that a party should not be permitted to impeach his own witness by introducing his *ex parte* statement in contradiction of his testimony unless the party is really surprised by the witness' testimony. In the case at bar, there was absolutely no showing that the government was surprised by the testimony of the witness Betts. The use, therefore, of his statement, which was obviously very damaging to the appellant Cranson was patent error.

II

THE PETITIONER KLOSTERMAN'S RIGHTS TO A FAIR TRIAL AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN THE TRIAL COURT REFUSED THE PETITIONER'S REQUEST TO HOLD A HEARING OUTSIDE THE PRESENCE OF THE JURY TO DETERMINE WHETHER PRETRIAL CONFRONTATIONS BETWEEN A VITAL IDENTIFICATION WITNESS AND THE ACCUSED VIOLATED DUE PROCESS.

The Fifth Circuit Court of Appeals, in a rather recent case of *United States vs. Sutherland*, 428 F.2d 1152 went to great pains to outline the proper procedure to be used when photographic identification has occurred prior to in-court identification. In that case, the court on page 1155 of the Opinion, stated that prior to offering the in-court identification before the jury the trial court should be accorded an opportunity *outside the jury's presence* to determine if a picture spread in a particular case was either impermissibly suggestive because of the number of photographs used or because of the number of times the photographs were displayed to the prospective witness.

If the judge determines, the court went on, that there was impermissive photographic identification he then can determine whether it was so suggestive as to give rise to a likelihood or irreparable misidentification. The court went on that if he does not find both factors present, then and only then may the identification be put before the jury.

What is most important in the *Sutherland* case, especially in the light of defense counsel's objection all through the identification procedure is the following quotation from the case:

> "The foregoing procedure will not only have the salutary effect of avoiding situations in which the District Judge must solemnly instruct the jury to disregard vital and unforgettable evidence, *but will also save the defendant the Hobson's choice of whether to attack the in-court identification by attacking a prior photographic identification that might wind up being upheld thereby reinforcing the identification of the defendant.* (Emphasis added) (pp. 1155-1156)

In the case of *Clemons vs. United States* 408 F.2d 1230, the United States Court of Appeals for the District of Columbia Circuit held as follows:

> "Whenever the prosecution proposes to make eye-witness identification a part of its case, the defense is entitled to know through disclosure by the prosecution or by evidentiary hearing outside the presence of the jury the circumstances of any pretrial identification." (p. 1237)

Following the exact same reasoning as the Fifth Circuit in *Sutherland*, the court went on:

> "Where the prosecution intends to offer only an in-court identification, the defense may challenge its admissibility. The court should then,

> on facts elicited outside the presence of the jury, rule upon whether a pre-trial identification by the same eye-witness is violative of due process or the right to counsel. If a violation is found, the court should then decide whether the in-court identification is still admissible because it has an independent source; indeed, it would appear in the interest of expeditious judicial administration for such a ruling to be made in any event. If the judge regards only the in-court identification as admissible, in the trial to the jury thereafter, the defense may as a matter of trial tactics, decide to bring out the pre-trial confrontation itself, hoping that it can thus detract from the weight the jury might otherwise accord the in-court identification." (p. 1237)

The case probably closest on point is that of *United States ex rel Ragazzini vs. Brierley*, 321 F. Supp. 440. This was a case arising from a Pennsylvania prosecution. During the State trial, a rape victim testified on behalf of the state. At the point in the State's direct examination where defense counsel expected that the prosecutrix would be asked to identify the defendant he requested a hearing outside the presence of the jury to determine the basis for the witness' expected in-court identification. The state objected to the hearing outside the presence of the jury and noted that it would not introduce any evidence in reference to a line-up confrontation but simply an in-court identification by the witness. Upon this representation the state trial judge denied the request for an independent hearing.

In *Ragazzini*, the trial court judge did not even allow defense counsel to cross-examine the witness as to the previous confrontation. The United States District Court, in Pennsylvania, considered Ragazzini's claim in a habeas corpus proceeding and issued the habeas corpus holding that it was error for the trial judge to refuse to entertain the defense counsel's request for a hearing outside the presence of the jury, even though the prosecution did not intend to introduce evidence of any pretrial identification confrontation.

On pages 443-444 of the decision, the court stated:

> "Where a proposed in-court identification is tainted by a prior constitutionally infirm pretrial confrontation, the proposed in-court identification is inadmissible in evidence. United States vs. Wade, *supra*, 338 U. S. at 240, 98 S.Ct. 1926, 18 L.Ed. 2d 1149. And if the defendant makes a timely challenge to the prosecutor's proposed in-court identification, the court is bound to conduct a hearing outside the presence of the jury to determine whether a pretrial confrontation between the same eyewitness and the accused was constitutionally infirm, and, if so, whether the in-court identification may still be admissible as having had an independent source. Gilbert vs. California, 388 U.S. 263, 272, 87 S.Ct. 1951, 18 L.Ed. 2d 1178 (1967); Clemons vs. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230, 1237 (1968). Defense counsel did make a timely challenge to the proposed in-court identification of relator by the prosecutrix in the instant case. That the prosecution did not intend to introduce

evidence of any of the pretrial confrontations was of no moment. United States vs. Wade, *supra*, 388 U.S. at 240, 87 S.Ct. 1926, 18 L.Ed. 2d 1149. *The State trial judge erred in refusing to entertain defense counsel's request for a hearing outside the presence of the jury to determine the manner by which the prosecutrix came by her identification of the relator and whether, in the light of the same, her proposed in-court identification would be admissible.*" (Emphasis Added)

On behalf of the petitioner Klosterman, it is respectfully submitted that only three people in the entire trial identified him.

One of these was Mr. Boyce James. He had known Klosterman for many years and, of course, his identification was not questioned.

Perhaps the most damaging identification, however, came from the witness Connie Sisson who was an indicted co-conspirator. She stated that during her testimony that she had only seen Klosterman on two occasions: once the day before in the courthouse and once in June of 1968 at the bar west of Fort Lauderdale where she claims she saw Klosterman talking to the petitioner Cranson outside of the bar in the middle of the day while Boyce James was changing the tags on the car. She further testified that she saw him for about five or ten minutes (TR. 396).

During the cross-examination of the witness Sisson, defense counsel approached the bench and asked whether it was still the court's position that he would not be entitled to a hearing outside the presence of the jury on

the issue of identification, and in particular, the confrontation the day before in the courthouse. The trial court was evidently of the opinion that the witness Connie Sisson had seen Klosterman on a great number of times, but even when the court realized that she had only seen him twice he still did not allow the hearing outside the presence of the jury (TR. 394-395).

"MR. KAY: Based on the Court's earlier ruling I'm to proceed with the identification. May I approach the Bench, sir?

THE COURT: Yes.

(The following Bench Conference occurred among Court and Counsel and out of the hearing of the jury.)

MR. KAY: Based upon the Court's ruling yesterday that I could not out of presence of the jury go into identification in front of the jury —

THE COURT: There is no question about identification here. I'm sure she said she was with them all the time. You can go into it any way you want to.

MR. KAY: You're not going to let me go into it out of the presence of the jury?

THE COURT: Certainly not. She said she dealt with these people day after day.

MR. KAY: She said she only saw him once.

THE COURT: I'm talking — she said only saw him — I'm talking about other two.

MR. KAY: I'm talking about his identification. O.K.

(The following proceedings occurred in open court.)

THE COURT: You may question her all about it that you want to if you want to, yes, sir."

The testimony of Goode as pointed out in the facts which related in this Petition was especially susceptible to misidentification. It was so susceptible in fact that the United States Attorney told the Court that he had "picked the wrong guy."

Certainly, under these circumstances there was not only a need for but fundamental fairness required that a hearing be held outside the presence of the jury. Since the court did not allow the hearing outside the presence of the jury the matter of pictures was brought up in front of the jury (TR. 172) and to make matters even worse, the government and the defendant finally stipulated to the fact that the witness Goode had previously *picked out a picture not of the petitioner Klosterman, but of the appellant Chase* (TR. 178-179).

It is obvious that the fact that the witness had picked out the appellant Chase in a picture confrontation would never have been known to the jury except for the fact that the judge did not allow a hearing outside of its presence. The testimony of the witness Goode, therefore, was extremely damaging, not only to Klosterman, but also to Chase. Petitioners submit that the error that occurred during the testimony of Goode is in and of itself sufficient to require reversal of their convictions.

III

THE PETITIONER KLOSTERMAN'S RIGHTS TO A FAIR TRIAL AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN THE TRIAL COURT ALLOWED THE GOVERNMENT TO MAKE USE OF A STATEMENT MADE BY THE PETITIONER KLOSTERMAN TO AN FBI AGENT DURING THE CROSS EXAMINATION OF THE PETITIONER KLOSTERMAN WHEN THERE WAS NEVER ANY SHOWING BY THE GOVERNMENT THAT THE STATEMENT WAS VOLUNTARY.

In the case of *Miranda vs. Arizona*, 384 U.S. 436, the Supreme Court of the United States stated:

> "The warnings required and the waiver necessary in accordance with out opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. *No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense.* The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made

were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement. In Escobedo itself, the defendant fully intended his accusation of another as the slayer to be exculpatory as to himself." (p. 725) (Emphasis added)

Petitioner submits, therefore, that there is no doubt that the interview with the FBI agents comes under the law as enunciated in *Miranda*.

Petitioner would further submit that it is elementary that before a confession can be used there must be a determination made outside the presence of the jury to determine if it is in fact voluntary.

Title 18, Section 3501 of the United States Code clearly spells out the procedure that is to be used. Appellant would particularly point out letter E of the statement which equates the term confession with any self-incriminating statement made, given orally or in writing.

The use of the statement during cross examination, therefore, and the testimony of the FBI agent in rebuttal was clearly erroneous without the determination by the trial court that the statement was voluntary.

Petitioner is not unmindful of the case of *Harris vs. New York*, 28 L.Ed. 2d 1. In that case the United States Supreme Court held that statements made by an accused might be used for impeachment, even if the *Miranda* rights were not given.

Rather than hurt the petitioner's position however, *Harris* clearly shows that what the trial court did in this case was clearly erroneous.

This is because *Harris* specifically allowed the use of these statements only where (1) such statements are inconsistent with the accused's trial testimony bearing directly on the crimes charged; and (2) although the police did not warn the accused of his right to appointed counsel before they questioned him when he was taken into custody, the accused makes no claim that his statements to the police were coerced or involuntary.

In *Harris*, the prosecution made no effort in its case in chief to use the statements, just as in the case at bar. Petitioner respectfully submits that when the court cut off defense counsel's request for a hearing under *Jackson vs. Denno*, 378 U.S. 368 and allowed the prosecution to make use of the statements given the FBI it did not allow the defendant to claim that the statements were in fact coerced.

Furthermore, a review of the things which the defendant Klosterman was impeached on show that they do not meet the first criteria of *Harris* in that they do not bear directly on the crimes charged.

In summary, therefore, the trial court did not (a) make a determination whether *Miranda* warnings were given at the time the statement was made; (b) did not make a determination whether the statement was coerced, but rather without any legal determination as to the statement's admissibility for any purpose allowed the government to make use of it. Such procedure should be condemned by this court and such procedure requires the reversal of the petitioner Klosterman's conviction.

CONCLUSION

For any or all of the above reasons enumerated within this brief, the petitioners' conviction should be reversed.

VARON, STAHL and KAY, P.A.
2432 Hollywood Boulevard
Hollywood, Florida 33020
Counsel for Petitioners

By _____
STEADMAN S. STAHL, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the within Petition for Writ of Certiorari to the Supreme Court of the United States has been mailed to Gilbert K. Davis, Esq., Assistant United Attorney, Post Office Building, Alexandria, Virginia 22313, this __ day of February, 1972.

VARON, STAHL and KAY, P.A.
Counsel for Petitioners
2432 Hollywood Boulevard
Hollywood, Florida 33020

By _____
STEADMAN S. STAHL, JR.

APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1411

UNITED STATES OF AMERICA,

Appellee,

-versus-

ALBION CRANSON, DAVID CHASE, and
JOSEPH J. KLOSTERMAN,

Appellants.

**Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Oren R. Lewis, District Judge.**

(Argued November 5, 1971 Decided December 29, 1971.)

Before CRAVEN, BUTZNER and RUSSELL, Circuit Judges.

Steadman S. Stahl, Jr., (Varon and Stahl, P. A. on brief) for Appellants, and Gilbert K. Davis, Assistant United States Attorney (Brian P. Gettings, United States Attorney, on brief) for Appellee.

DONALD RUSSELL, Circuit Judge:

The defendants appeal from a conviction both of conspiracy to violate, and of several substantive offenses, under the Dyer Act (18 U.S.C. § 2312).

We affirm.

The defendants assert three grounds of appeal. Two of these require little comment. In one the defendants complain that the Trial Court permitted the District Attorney to attempt- unsuccessfully, it may be added- to refresh the recollection of an uncertain witness for the Government by reference to a prior statement given by the witness to the FBI. The matter of refreshing a witness' recollection and the manner used are largely within the discretion of the Trial Judge. Beaty v. United States (4th Cir. 1953) 203 F. 2d 652, 655; Williams v. United States (7th Cir. 1966) 365 F. 2d 21, 22, cert. den. 385 U. S. 981. To permit the refreshing of a witness' recollection by reference to prior statements is within such discretion. Roberson v. United States (5th Cir. 1958) 249 F. 2d 737, 742, 72 A.L.R. 2d 434, cert. den. 356 U. S. 919, 78 S. Ct. 704, 2 L. Ed.2d 715. That is all the Trial Judge permitted in this case and such action was plainly within his discretion. Thomas v. United States (9th Cir. 1955) 227 F.2d 667, 671, cert. den. 350 U. S. 911, 76 S. Ct. 194, 100 L. Ed. 799.

The second complaint is that the District Attorney was allowed to cross-examine the defendant Klosterman on a statement given by him to the FBI, without showing compliance with the requirements of Miranda.[1] That cross-

[1]Miranda v. Arizona (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694, 10 A.L.R. 3d 974 reh. den. 385 U.S. 890.

examination under such circumstances is permissible for purposes of impeachment was recently declared in Harris v. New York (1971) 401 U. S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1. See also, Riddell v. Rhay (1971) ___ U. S. ___, 40 L.W. 3248, November 23, 1971.

The final claim of error concerns only the defendant Klosterman and relates to the procedure to be observed at trial when on-trial identification evidence is offered. It involves the testimony of the witness Connie Sisson, who gave an in-court identification of the defendant Klosterman.[2] It is not claimed that the record establishes the inadmissibility of this identification testimony, or even provides a basis for objecting to its admissibility, under the due process principles enunciated in Simmons v. United States (1968) 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247.[1] The argument rather is that the Trial Court erred

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[2]Two other witnesses identified Klosterman. One was an alleged co-conspirator Boyce James. Klosterman offered no objection to his identification. The other was the witness Goode, to whom a stolen car had been sold. At trial, Goode, with some hesitation, identified Klosterman as the seller. It was then stipulated that, in a prior photographic identification, the witness had identified an entirely different person as the seller. This stipulation, while discrediting the witness' on-trial testimony, actually rebutted any idea that the witness' on-trial testimony had been tainted by any impermissible suggestions during the photographic identification within the rule in Simmons v. United States, supra (390 U.S. at p. 384).

The witness David Sisson met on two occasions, incidental to the conspiracy, an individual identified as Mitchel, which was a name by which Klosterman was known but was uncertain about making an identification of Klosterman or the man he met under the name of Mitchel,

[1]Neither party argued or briefed the applicability of Section 3502, 18 U.S.C., to the in-court identification testimony of the witness Connie Sisson. See, United States v. Levi (4th Cir. 1968) 405 F.2d 380, 382-3; United States v. Valez (8th Cir. 1970) 431 F.2d 622, 624, n. 1; United States v. Sutherland (5th Cir. 1970) 428 F.2d 1152, 1158; United States v. Pollack (5th Cir. 1970) 427 F.2d 1168, 1170, cert. den. 400

in denying an evidentiary hearing, outside the presence of the jury, in order to permit the defendant Klosterman to inquire into whether there may have been such impropriety in any pre-trial identification procedures, particularly photographic, if any there was, used in connection with the witness' on-trial identification so as to support an objection based on a claim of want of due process in connection with the on-trial identification.

While it is not necessary that in every situation where courtroom identification witnesses are used their testimony be "filtered or tested" by an evidentiary hearing, it is established that "where a timely[4] and sufficient motion is made to suppress identification testimony on the ground that it has been tainted by pretrial photographic identifica-

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U.S. 831; United States v. Butler (1st Cir. 1970) 426 F.2d 1275, 1277, n. 2, cert. den. 401 U.S. 978. Section 3502 declares admissible the in-court identification made by one who "saw the accused commit or participate in the commission of the crime for which the accused is being tried * * *" The witness Connie Sisson identified the defendant Klosterman as being in the presence of others who concededly were members of the conspiracy and as being present, talking to one of the conspirators, while license plates were being changed on a car. Her testimony was intended, it would appear, merely to show Klosterman's acquaintance and association with members of the conspiracy. So construed, her identification was assumed not to be within the statute; and this, it would seem, was the conclusion of counsel both for the Government and for the defendants. See, United States v. Ballard (5th Cir. 1970) 426 F.2d 127, 129-30, n. 5. We accept this view, especially since the constitutionality of Section 3502 is still in doubt (United States v. King (D.C.Tex. 1970) 321 F.Supp. 614, 616-7; Cf. United States v. Levi, supra., at pp. 382-3) and since, whether the statute be applicable or not, we are of the opinion that the defendant Klosterman, under the particular circumstances relating to this in-court identification, was not entitled to an evidentiary hearing, outside the presence of the jury.

[4]A defendant must be diligent in taking "timely steps * * * to secure judicial determination of (such) claims of illegality" in connection with motions to suppress evidence. Nardone v. United States (1939) 308 U.S. 338, 341.

tion procedures" or other improper identification procedures, an evidentiary hearing outside the jury's presence is required. United States v. Allison (9th Cir. 1969) 414 F. 2d 407, 410, cert. den. 396 U. S. 968; Haskins v. United States (10th Cir. 1970) 433 F. 2d 836, 838; United States v. Ranciglio (8th Cir. 1970) 429 F. 2d 228, 230.[5] In order to be timely, the motion for such purpose, like all motions to suppress evidence, should normally be made prior to trial,[6] since, "To interrupt the course of the trial for such

[5]As observed in note 3, section 3502 was not cited by either party and we see no reason to consider its proper scope or constitutional validity in this appeal.

[6]Rule 41(e), Federal Rules of Criminal Procedure, 18 U.S.C.; Section 2518, 18 U.S.C.; United States v. Milanovich (4th Cir. 1962) 303 F.2d 626, 628, cert. den. 371 U.S. 876, 83 S.Ct. 145, 9 L.Ed. 2d 115; United States v. Blythe (4th Cir. 1963) 325 F.2d 96. See, Clemons v. United States (D.C.Ct. 1968) 408 F.2d 1230, 1237, n. 4, cert. den. 394 U.S. 964, from which it would appear that the District Courts of the District of Columbia have adopted a specific rule on motions to suppress identification evidence, which is substantially similar to Rule 41(e).

The defendant has remedies to secure pre-trial information on identification procedures undertaken by the Government in advance of trial as a basis for a motion to suppress. Accordingly, if he chooses, the defendant may, under Rule 16, Federal Rules of Criminal Procedure, move for the production of all "photographs used in the identification" of the defendant by Government witnesses. Simmons v. United States, supra. (390 U.S. at pp. 388-9); United States v. Barber (D.C.Del. 1969) 297 F.Supp. 917, 922, and 296 F.Supp. 795, 801 (rev. on another point, 442 F.2d 517). Of course, the defendant would be aware of any line-up or confrontation identification procedures. Pre-trial discovery of the circumstances of any pre-trial identification, whether photographic or otherwise, may likely be available on motion. Cf., Clemons v. United States, supra. (408 F.2d at p. 1237); Haskins v. United States, supra., (433 F.2d p. 838). It is, however, doubtful whether this would permit a defendant to secure, in advance of trial, the identity of all proposed identification witnesses. See, United States v. Wade (1967) 388 U.S. 218, 238, n. 28, 87 S.Ct. 1926, 18 L.Ed. 2d 1149; United States v. Chase (4th Cir. 1967) 372 F.2d 453, 466, cert. den. 387 U.S. 907; Cf. Proposed Amendments to the Federal Rules of Criminal Procedure, Proposed Rule 16 (vi), 48 F.R.D. 589, and 603-5.

See, also, Simmons v. United States, supra., at pp. 388-9, where the Court said:

auxiliary inquiries impedes the momentum of the main proceeding and breaks the continuity of the jury's attention." Nardone, supra, p. 342, 308 U. S. Of course, if the defendant can show that he was reasonably unaware either that on-trial identification would be offered or that such identification was tainted, a motion at trial should be entertained. Not only must the motion for an evidentiary hearing be timely, but it should be supported by a claim of sufficient " 'solidity' * * * to justify the holding of such a hearing, * * *." Lawn v. United States (1958) 355 U. S. 339, 347, 78 S. Ct. 311, 2 L. Ed. 2d 321; Cohen v. United States (9th Cir. 1967) 378 F. 2d 751, 760, cert. den. 389 U. S. 897; Grant v. United States (2d Cir. 1960) 282 F. 2d 165, 170. In ascertaining whether a motion to suppress is supported by sufficient "solidity", it is often stated that the supporting claim for an evidentiary hearing on a motion to suppress must be "sufficiently definite, specific, detailed, and non-conjectural, to enable the court to conclude that a substantial claim (was) * * * presented". Cohen v. United States, supra (at p. 761, 378 F. 2d). Such a strict rule of specificity of claim would seem inapplicable where identification procedures are challenged but motions seeking an evidentiary hearing on such pre-trial procedures, especially if made at trial would require a claim rising above the level of mere hope and including some reasonable assertion of possible taint in the preliminary identification procedures. United States v. Allison, supra (at p. 410, 414 F. 2d); People of Territory of Guam v. Cruz (9th Cir.

"The defense surely knew that photographs had played a role in the identification process. Yet there was no attempt to have the pictures produced prior to trial pursuant to Fed. Rule Crim. Proc. 16. When production of the pictures was sought at trial, the defense did not explain why they were needed, but simply argued that production was required under §3500."

1969) 415 F. 2d 336, 338. At the very least there would have to be a statement that there has been a pre-trial photographic or line-up identification or other type of identification confrontation before the motion for an evidentiary hearing should be entertained; in short, there should be some showing that "a Simmons issue is present."[7]

In determining whether the request for an evidentiary hearing should be granted "each case must be considered on its own facts"[8] and some scope must be allowed for discretion on the part of the Trial Judge.[9] Here, the defendant Klosterman made no pre-trial motion and on-trial has stated no ground of objection to the in-court identification. He asserts no pre-trial suggestive photographic identification.[10] He does not claim that there was an uncounseled line-up identification. As already pointed out, it is simply his contention that, reserving all rights of objection, he should be permitted to stop the trial "in midstream" in order that he may have an evidentiary hearing outside the presence of the jury to determine whether he may have a ground which he would wish to use as an objection to the in-court identification. In support, he argues that, if forced to resort to cross-examination to explore into possible pre-

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[7]United States v. Sutherland, supra., (428 F.2d at p. 1155).

[8]Simmons v. United States (390 U.S. at p. 384).

[9]See United States v. Kinnard (D.C.Ct. 1968) 294 F.Supp. 286, 289-90. In this case Judge Gesell urges that all the facts surrounding an identification be submitted to the jury without "blinders", with the Court exercising its normal power to "intervene and prevent a miscarriage of justice". This was largely the thrust of the opinion in United States v. Levi, supra., at pp. 382-3.

[10]Cf., Keith v. United States (9th Cir. 1970) 421 F.2d 1295, 1296, cert. den. 402 U.S. 985, where the Court observed that "no pre-trial identification was mentioned on either direct or cross-examination."

trial identifications as a predicate for a motion to suppress, the Government could use such evidence of, for instance, a pre-trial photographic identification, if confirmatory of the in-court identification, to bolster the in-court identification. The answer to this argument, however, is that the Government could have done this, whether the defendant inquired into such photographic examination or not. See, United States v. Hallman (D.C.Ct. 1971) 439 F. 2d 603, 604. And it may be remarked that the fact that the Government did not offer such confirmatory evidence on direct examination would indicate either that there had been no pre-trial photographic identifications or that such pre-trial procedures had been contradictory of the in-court identification, which, incidentally, was the situation in connection with the identification made by another witness in this case. See note 2, supra. Either circumstance, if developed on cross-examination, could not have prejudiced the defendant. If the photographic identification were different from the in-court identification, the evidence so developed would have been helpful to the defendant; if, on the other hand, there had been no photographic identification, the whole examination would have been harmless. In our opinion, a defendant who wishes to interrupt a trial and to secure an evidentiary hearing outside the presence of the jury on the admissibility of an in-court identification, assuming that such claim for an evidentiary hearing is timely, should provide some possible basis for an objection, particularly that there has been a pre-trial photographic or line-up identification, or arranged confrontation; and, if to provide such basis, it is necessary to cross-examine, to this limited extent, the identification witness before making demand for an evidentiary hearing, the defendant should do so. We do not intimate that he must probe into the circumstances of the photographic or

line-up identification before making his demand; what we do hold is that at a minimum he must establish that there has been pre-trial identification as a predicate for a motion for an evidentiary hearing outside the presence of the jury. Any other rule would mean that whenever courtroom identification testimony is offered the defendant could force an interruption of the trial, whether there is any justification or not and whether his motion is timely or not. Such a rule, so fraught with opportunity for needless and wasteful trial delays, cannot be countenanced.

As a matter of fact, even if there had been in this case a pre-trial photographic identification by the witness Connie Sisson that failed to meet the standards fixed by Simmons, the in-court identification by the witness would still have been admissible if it had an independent origin. See, Vance v. State of North Carolina (4th Cir. 1970) 432 F.2d 984, 987-8; United States v. Horton (D.C.Ct. 1971) 440 F. 2d 253, 254; Fitts v. United States (5th Cir. 1969) 406 F. 2d 518, 519, cert. den. 400 U. S. 842; Clemons v. United States, supra, (408 F. 2d at p. 1237); United States v. Butler, supra (426 F. 2d at pp. 1276-7). The testimony of the witness with reference to the basis for her identification was sufficiently trustworthy and reliable to constitute such an independent source or origin. She testified she was introduced to Klosterman under the name of "Joe" in front of a bar west of Ft. Lauderdale, Florida. Hollywood, Florida, was Klosterman's place of residence and he conceded he was often referred to and went under the name of "Joe Mitchel". After the introduction, the witness, Klosterman and three of the alleged confederates in the conspiracy talked for some five to ten minutes in the presence of the witness. It was daylight and the witness stood only a few feet from Klosterman. Mrs. Sisson stated she observed

intently Klosterman. Her testimony on this point was clear and definite. It was not shaken or weakened by cross-examination. This was the basis for her identification. It was supported by the testimony of her husband, who, though he could not identify Klosterman definitely, did recall meeting at the time referred to by his wife a man who went by the name of "Mitchel". Viewed as a whole, this testimony was clearly sufficient, as an independent source, to sustain the admissibility of the witness Connie Sisson's in-court identification and rendered unnecessary an evidentiary hearing, outside the presence of the jury on the admissibility of such testimony. The issue under these circumstances became one of credibility not of admissibility; and that, as the District Court appropriately ruled, was an issue for the jury.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 71-1411

Albion Cranson and Joseph J. Klosterman,
Appellants,

-versus-

United States of America,
Appellee.

ORDER

Upon consideration of the petition for rehearing, and with the concurrence and approval of the other members of the panel,

IT IS ORDERED AND ADJUDGED, That the petition for rehearing is denied.

For the Court:

/s/ Signature Illegible

United States Circuit Judge

Filed, February 2, 1972. Samuel W. Phillips Clerk

A True Copy, Teste:

Samuel W. Phillips, Clerk

By /s/ Frances S. Sewell

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No. 71-1023

In the Supreme Court of the United States

OCTOBER TERM, 1971

ALBION CRANSON and JOSEPH J. KLOSTERMAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1023

ALBION CRANSON and JOSEPH J. KLOSTERMAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted of transporting stolen automobiles in interstate commerce and conspiracy to commit that offense, in violation of 18 U.S.C. 2312 and 371. Cranson was sentenced to three and one-half years' imprisonment, and Klosterman was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. A).

The pertinent facts are not disputed. Petitioners were tried with David Chase, who was also convicted. Three other co-conspirators, Boyce James, Connie Sisson and David Sisson entered pleas of guilty and testified for the government.[1]

The evidence showed that petitioners participated in an interstate car theft operation involving high priced late model automobiles in the Ft. Lauderdale, Florida, area. Under the plan Cranson, who was operating an automobile agency in Pompano Beach, was to receive license numbers of cars and obtain from the Florida title bureau information about the car. The information was to be used to prepare forged title blanks also obtained by Cranson, and a new title and license plates then were to be sought in a different state. When the new title had been received, a car fitting the description on the title was to be stolen and sold, using the fraudulent registration, to car dealers in the Washington, D.C., area. A man identified as Mitchel[2] was to supply identification papers for the persons selling the cars. (Tr. 204-210, 219, 228-229, 372.)

Cranson contacted David Sisson about joining the scheme in February 1968 (Tr. 207-208). Sisson agreed and recruited Connie Sisson and Robert Pow-

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[1] Connie Sisson's name was Connie Scott at the time of trial. Another conspirator, Robert Poweleit, pleaded guilty subsequent to this trial.

[2] Petitioner Klosterman's full name is Joseph Mitchel Klosterman (Tr. 487) and he admitted doing busines in the name of Joseph Mitchel (Tr. 494).

eleit to assist in the operation (Tr. 210-212). He also helped Cranson procure a machine for preparing false serial number plates to use on the stolen cars (Tr. 217-218, 307-308).

Petitioner Klosterman enlisted Boyce James in April 1968 to steal cars for the operation, telling him that the conspirators had a machine for printing serial plates and that counterfeit titles would be obtained so that the cars could be resold in the Washington, D.C., area. James identified petitioners at trial and testified that he knew Klosterman as Joe Mitchel (Tr. 322-324).

The plan was put into operation in June 1968 (Tr. 215). About forty or fifty likely automobiles were located and, after their titles were checked, about half of them were selected as having suitably clear titles to be useful (Tr. 228-229, 372). James testified that a short time later he and Klosterman stole a 1967 Pontiac Bonneville from a dealership in Ft. Lauderdale. Cranson took David and Connie Sisson to a bar near Ft. Lauderdale, where they met James and the man they knew as "Joe Mitchel" (Tr. 222-224, 373-374). James changed the tags on the Bonneville and Connie and David Sisson were instructed by Cranson to drive the car to Arlington, Virginia (Tr. 224-226, 374-375). At trial, Connie Sisson identified Klosterman as the "Joe Mitchel" she had met at the Ft. Lauderdale bar (Tr. 222-224, 373-374). Defense counsel sought to question her out of the presence of the jury concerning any possible pretrial identification of Klosterman, which the trial judge refused to permit (Tr. 394-395, 40-45).

The Pontiac was subsequently sold to a dealer in the Washington, D.C., area (Tr. 231-232, 234, 375-377). Connie Sisson testified that she personally sold eight or nine stolen cars (Tr. 380). James admitted having stolen approximately twenty-four cars in five states for the operation. He received expense money from Cranson and false identification papers from Klosterman, and gave the sales proceeds to Cranson or Chase (Tr. 329-332, 335-337, 339). Cranson's fingerprints were on fraudulent Florida titles and on applications for Virginia titles for stolen cars. The true serial numbers of the stolen cars recovered matched the numbers for the cars described in the testimony (Tr. 467-470, 33-35, 37-38, 78, 80-82, 86-87, 99-100, 142-148, 157-159, 182-184).

Other witnesses also testified concerning the theft and purchase of various automobiles involved. George Betts stated that Cranson had offered him a job selling cars in October 1968. When Betts could not recall if Cranson had said that the cars were stolen, the government tried unsuccessfully to refresh his memory by reference to an F.B.I. interview in which Betts had so indicated. The trial judge overruled defense objections to the use of the interview for this purpose (Tr. 449-450). Kenneth Goode related that he bought a car, subsequently identified as stolen, from a man in June 1968. He said that he could not positively identify the man from whom he had purchased the car, but thought that Klosterman was the one (Tr. 160-161, 165-168). The government attorney stipulated that Goode had earlier picked Chase

from photographs as the man who had sold him the car. (Tr. 160-161, 165-168, 170, 178-179).

Klosterman, the only defendant to testify, denied having had anything to do with the auto theft ring. On cross-examination the government sought to impeach him by showing that in an interview with F.B.I. agents he had said that he knew of the operation and had been offered two thousand dollars a week to participate in it. Defense objections to this were overruled (Tr. 490-492, 513-516).

Petitioners reassert here the contentions raised in the court below. Petitioner Cranson argues that the use of prior statements in the unsuccessful attempt to refresh witness Betts' memory was improper (Pet. 18). Petitioner Klosterman contends that the trial judge erred in allowing evidence of the interview with F.B.I. agents to impeach his testimony (Pet. 29), and by refusing to conduct a hearing outside the presence of the jury concerning whether there had been pre-trial identifications by Connie Sisson (Pet. 22). These contentions are fully answered in the opinion below, on which we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

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